IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11-7-2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.R.P.NPD No.337 of 2002
and
CMP Nos.3661 and 3662 of 2002

M.Chinniyan .. Petitioner/Tenant

vs

1.Tmt.Kasthuri Radhakrishnan
2.R.Murali
3.R.Saravanan Land lords
4.R.Kanjana .. Respondents

Civil revision petition preferred under Sec.25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23/73 against the decree and judgment dated 28.6.2001 passed in RCA No.5/2001 by the Principal Subordinate Judge, Erode, confirming the order of eviction passed in RCOP No.26/98 on 31.10.2000 by the Rent Controller (I Additional District Munsif), Erode.

For Petitioner : Mr.T.R.Rajagopalan
Senior Counsel
for Mr.R.Subramanian

For Respondents : Mr.V.K.Muthusamy
Senior Counsel
for Mr.P.Sengottuvel
for RR1 to 3

Mr.M.M.Sundresh for R4

ORDER

Challenge is made to a judgment of the Principal Subordinate Judge, Erode, made in RCA No.5 of 2001 affirming an order of eviction made by the Rent Controller of the said place in RCOP No.26 of 1998 a petition for eviction on the ground of willful default and personal use and occupation filed by the respondents herein.

2.The Court heard the learned Senior Counsel on either side.

3.The respondents 1 to 3 herein filed the said RCOP alleging that they are the absolute owners of the property described in the Schedule to the petition; that the revision petitioner was put in possession by one Dhanapal, the power agent of Radhakrishnan, the husband of the first respondent and father of the respondents 2 and 3; that the revision petitioner-tenant filed O.S.No.87/89 before the Sub Court, Erode, against the said Radhakrishnan and the respondents 1 to 3 herein alleging that they attempted to evict him forcibly, and hence, permanent injunction

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should be granted restraining them from interfering with his possession except by due process of law; that from that time onwards, he called himself as a tenant; but, he has not paid rental for more than a decade, and thus, he has committed willful default; that apart from that, after the death of her husband Radhakrishnan in 1994, she has been living all along in her parental home at Salem; that she is to come back to her matrimonial home; that both her sons are in different places; that due to her old age, she wanted to be in her own house; that except the premises in question, they had no other property, and under the circumstances, they required the same bonafide for their own occupation, and hence, he was to be evicted.

4.The revision petitioner-tenant resisted the petition inter alia stating that originally, he was put in possession as a tenant by one Dhanapal, the power agent of Radhakrishnan; that there was an agreement executed between one Pongianna Gounder and the said Radhakrishnan, which was assigned in favour of the revision petitioner; that there was a notice issued by Radhakrishnan; that the stand that was taken by him was that the revision petitioner was only a trespasser; that after that, the revision petitioner filed O.S.No.87/89 wherein he sought for a permanent injunction stating that both Radhakrishnan and the respondents 1 to 3 herein were making attempts to evict him from the premises unlawfully, and hence, they should be injuncted; that the written statement was filed by all the defendants therein stating that he was a trespasser; that while the matter was pending so, he filed RCOP No.2/91 for deposit of rental; that he made the deposits accordingly for a period of three years; that pending the same, the respondents 1 to 3 filed O.S.No.53/89 showing Radhakrishnan as first defendant and others as other defendants, wherein it has been clearly stated that the petitioner was only a trespasser; that they sought for a declaration that the property exclusively belonged to them; that Radhakrishnan took a stand that the suit was to be decreed; that they also called the revision petitioner as a trespasser; that when the matter was pending, the said Radhakrishnan died on 23.9.1994; that on 5.1.1999, O.S.No.53/89 was withdrawn by them; that O.S.No.87/89 was decreed on 21.12.1998 in view of the endorsement made by the opposite party recognising the revision petitioner as a tenant; that in all these proceedings, he has been termed only as a trespasser; that since he has been called as a trespasser all along, no question of allowing the respondents 1 to 3 to call him suddenly as a willful defaulter would arise; that apart from that, the property originally belonged to Radhakrishnan; that Radhakrishnan left behind him not only the respondents 1 to 3, but also one daughter by name Kanjana; that the RCOP itself could not be maintained; that as far as the grounds of willful default and personal use and occupation were concerned, it lacks thoroughly bonafide, and hence, the petition was to be dismissed.

5.The Rent Controller on enquiry found that the grounds put forth by the respondents 1 to 3 were made out, and it is a fit case for ordering eviction and accordingly, ordered so. The order of the Rent Controller was challenged by the revision petitioner-tenant before the appellate forum in RCA No.5 of 2001, which was also dismissed. Under the circumstances, this revision has been brought forth.

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6.It is brought to the notice of the Court that once this revision was heard and orders were passed, a review application was filed by the tenant, and that review has been ordered. Under the circumstances, it is now placed before this Court for disposal.

7.Advancing his arguments on behalf of the petitioner-tenant, the learned Senior Counsel raised three contentions. (a) Firstly, the RCOP itself was not maintainable for the reason that originally, there was a lease agreement entered into between the revision petitioner-tenant on the one part and one Dhanapal, the power agent of the original owner Radhakrishnan, on the other part. Thus, it would be quite clear that the property originally belonged to Radhakrishnan. If to be so, on the death of Radhakrishnan, the property would have devolved upon the respondents 1 to 3 as wife and sons respectively and also one daughter Kanjana. This contention was actually raised in the course of the counter. The respondents 1 to 3 have called themselves as exclusive owners of the property; but, it was not correct. Once the original owner Radhakrishnan through the power agent Dhanapal leased out the property, it would be futile on the part of the respondents 1 to 3 to call themselves as absolute owners of the property. Under the circumstances, in the absence of non-impleading of the said daughter Kanjana as petitioner-party in the RCOP and getting consent from her to file the petition, the petition itself could not be maintained. Hence, the petition should have been dismissed.

(b) Secondly, as regards the ground of willful default, all along the stand of the respondents 1 to 3 was that he was only a trespasser. That apart, they have gone to the extent of filing a suit, wherein they called him as a trespasser. In the suit filed by the petitioner herein in O.S.No.87/89, a written statement was filed calling him as a trespasser. Even before the Rent Controller, the first respondent was examined as P.W.1, where she took a stand that the revision petitioner was not a tenant, but a trespasser. Under the circumstances, it would be quite clear that the same was the stand maintained by them all along till the end of the suit in O.S.No.87/89 wherein an endorsement was made by her on 21.12.1998 recognising him as a tenant. As far as that period was concerned, he was termed as a trespasser. Once these respondents 1 to 3 termed him as a trespasser in the past period namely a decade, they should not be now allowed to call him as a defaulter, much less willful defaulter. So long as that period was concerned, he should not be termed so. As far as the subsequent period was concerned, on the first day of the hearing of the RCOP, the entire payment of arrears was made, and following the same, rental payments have been made regularly in the pending proceedings, and therefore, no question of willful default would arise. In such circumstances, the said ground has got to be rejected.

(c) Thirdly, as regards the other ground of personal use and occupation, both the sons who are the respondents 2 and 3, are residing in two different places, and the first respondent-wife is also residing at Salem. Though she has stated that she has no other property except the property in question, she has categorically admitted in evidence that she could not live alone, and thus, it is doubtful whether they have proved the bonafide what is the main requisite for eviction on the ground of personal use and occupation. Under the circumstances, the authorities

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below should have dismissed the petition outright. But, the Rent Controller has not adverted its attention either on the legal or on the factual position, and subsequently, it has also been affirmed by the appellate forum erroneously. Hence, the orders of the authorities below have got to be set aside.

8.In answer to the above, it is contended by the learned Senior Counsel for the respondents 1 to 3 that the petition filed by the respondents 1 to 3, was in order; that as far as the respondents 1 to 3 are concerned, they called themselves as absolute owners of the property; that even in the suit filed by them, they stated that they are the owners of the property; that even assuming that the property originally belonged to Radhakrishnan and subsequently devolved upon them, any one of the co-owners can maintain a petition for eviction; that in the instant case, all the respondents 1 to 3 have filed the petition, and thus, it is not legally defective; that under the circumstances, the petition has been brought forth; that the contention that the petition is not maintainable was not raised before the forums below; that it is for the first time such a contention being made before this Court, and hence, that contention has got to be rejected; that as far as the grounds for eviction are concerned, it is the consistent stand of the revision petitioner that he is a tenant, and he went to the extent of filing a petition in RCOP No.2/91 for deposit of rental; that he has also made deposits for a period of 3 years; that for the reasons best known to him, he has not continued it thereafter; that having taken a stand that he is a tenant all along, he should have deposited the rental continuously; and that having failed to do so, now he cannot be allowed to say that he was under the impression that he need not pay the rental since he was termed as a trespasser by the opposite party.

9.Added further the learned Senior Counsel that even during the pendency of the RCOP, at no point of time, he was regular in making payment; but, he has made the payment in lump sum; that during the pendency of the proceedings also, the default continued, and hence, he is a willful defaulter in the eye of law; that as far as the ground of personal use and occupation is concerned, from the evidence of P.W.1, it would be quite clear that after the death of her husband Radhakrishnan, she is residing at Salem in her mother's house; that it is true that both the sons are living away; that she wanted to go back to the native place and live in her own house; that under the circumstances, there cannot be any impediment in law to allow her to be in her own house; that even there is no contra evidence that she has got any other property anywhere; that under the circumstance the ground of personal use and occupation was also available to them, and hence, the orders of the authorities below have got to be sustained.

10.The Court paid its anxious consideration on the submissions made, and is of the considered opinion that as far as the first question is concerned, the RCOP is not maintainable for the reasons stated infra. Even as per the averments in the RCOP, the respondents 1 to 3 herein who are the petitioners therein, and who are the wife and sons of Radhakrishnan respectively, have called themselves as absolute owners of the property, and in that capacity, they have filed the petition. In the RCOP, there is a clear averment that one Dhanapal, the power agent of Radhakrishnan, actually put the revision petitioner in possession of the property as a tenant. Thus, it would be quite clear from the averments made in the petition itself that the revision petitioner was put in

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possession not by the respondents 1 to 3, but by Dhanapal, the power agent of Radhakrishnan. Apart from that, the property was originally allotted in favour of Radhakrishnan, and Radhakrishnan was the owner of the property. Therefore, the petitioner has been in possession of the property all along. It is also not in controversy that on the death of Radhakrishnan, the property would have devolved upon his heirs and fell to the shares of the respondents 1 to 3 and also his daughter Kanjana, Now, the respondents 1 to 3 called themselves as owners of the property. It was also brought to the notice of the Court that there was exchange of notices between the parties pursuant to the assignment made by one Pongianna Gounder with whom the agreement was entered into by Radhakrishnan. In the reply notice, they have categorically denied that Kanjana, the daughter, had no right in the property at all. Thus, they claimed that the property belonged to them, and the RCOP was brought by the respondents 1 to 3 as if they are the exclusive owners of the property. But, it would be quite evident from the available materials that no lease agreement was entered into between the petitioner-tenant and the respondents 1 to 3; but, on the other hand, he was put in possession by the power agent of Radhakrishnan, and thus, he came into possession long back.

11.It is pertinent to point out that when the RCOP was filed, the respondents 1 to 3 called themselves as owners of the property. It is not their case that they had got any consent from the said Kanjana, the daughter of Radhakrishnan. As rightly contended by the learned Senior Counsel for the respondents 1 to 3, in a case where the property belonged to number of co-owners, one can maintain the application on the grounds available. But, in the instant case, the respondents 1 to 3 called themselves as exclusive owners of the property. If to be so, that is not actually the true state of affairs. Originally, the property belonged to Radhakrishnan. If found to be so, either Kanjana should have been added as petitioner-party in the RCOP at the earliest or consent should have been obtained from her for filing the RCOP on her behalf; but, either of them was not done. Hence, no question of the co-owner filing a petition would arise. In such circumstances, the said provision though available, cannot be applied to the present facts of the case.

12.Apart from the above, whether the RCOP itself could be maintained is also doubtful. From the very beginning, the consistent stand as found in the written statement filed by Radhakrishnan and the respondents 1 to 3 herein in O.S.No.87/89 filed by the revision petitioner seeking an order of injunction, was that he was a trespasser. The respondents 1 to 3 filed O.S.No.53/89, wherein they also took a stand that the petitioner herein was only a trespasser, and it continued till 5.1.1999, when O.S.No.53/89 was withdrawn by them. O.S.No.87/89 was decreed on 21.12.1998, wherein there was an endorsement made by the opposite party to the effect that the revision petitioner was a tenant. But, at the time of the examination, the first respondent herein as P.W.1, again maintained the stand that the revision petitioner was a trespasser. All would go to show that even today, they maintained the stand that he was only a trespasser. If to be so, it is highly doubtful, having taken such a stand whether they can be allowed to maintain the RCOP itself, as one done in this case.

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13.For the following two reasons, the Court has to record a finding that the RCOP itself is not maintainable. Firstly, the respondents 1 to 3 continued to have their stand that the revision petitioner was a trespasser, and subsequently, they have recognised him as a tenant in order to file the RCOP. Secondly, the said Kanjana should have been added as petitioner-party in the RCOP or consent at least, should have been taken from her for filing the RCOP on her behalf, but not done so. Under the circumstances, this Court is of the considered opinion that the RCOP could not be maintained. The contention put forth by the respondents' side that this contention was not raised before the forums below cannot be countenanced since it has been clearly averred in the counter to the RCOP that the averment made in the application that they are the owners of the property is not correct, and Radhakrishnan had a daughter by name Kanjana. In such circumstances, whether the RCOP on that ground was defective was not noticed by either of the forum below. But, the Rent Controller has taken the RCOP on file as maintainable and proceeded so. The appellate forum has also not considered this aspect of the matter. This Court is of the view that there is no impediment in considering this legal plea at this stage. Thus, it can be well stated that the RCOP is not maintainable. Since the question of maintainability of the RCOP is taken up for consideration and answered above, the other two grounds urged, do not arise for consideration. Accordingly, the orders of the authorities below are set aside.

14.In the result, this civil revision petition is allowed. No costs. Consequently, connected CMPs are closed.

nsv/

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1.The Principal Subordinate Judge
Erode

2.The I Additional District Munsif
Erode

3. The Section Officer, V.R.Section,
High Court, Madras.

+1 cc to Mr.V.P.Sengottuvel, Advocate Sr.No.41665.

+1 cc to Mr.R.Subramanian, Advocate Sr.No.41761.

VC(CO)

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